MARIAYEE & ANOR. v. MOHAMED NASIR & ANOR.

[F.C. (Salleh Abas L.P., Wan Suleiman & Seah S.C.JJ.) July 16, 1984, January 19, 1985]
[Kuala Lumpur – Federal Court Civil Appeal No. 334 of 1983]

Tort – Damages – Quantum of damages – Prospect of promotion – Value of housing – Loss of pension prospects – Exemplary damages – Civil Law Act, 1956, ss. 7 & 8.

Damages – Fatal injury – Quantum – Prospect of promotion – Value of housing – Loss of pension prospects.

The appellants in this case were the administrators of the estate of Abel John (deceased). The deceased was shot and killed by the police at a road block after failing to stop when ordered to do so. The appellants claimed damages for the benefit of the dependents under section 7 of the Civil Law Act, 1956. Liability was admitted and the only issue was the quantum of damages. The deceased was a Lance Corporal in the army and he and his family lived in free army quarters. It was argued on the appeal (a) that the learned trial judge erred in law in excluding from the computation of damages the fact that the deceased could have been promoted to Sergeant with commensurate higher pay and pension (b) the learned trial judge erred in law in holding that the plaintiffs were not entitled to claim as a head of damages an amount equal to the value of the housing the dependents had lost as a result of the death of the deceased (c) the learned trial judge ought to take into account the loss in the amount of pension the deceased would have received had he retired at the age of 50 after having been promoted to Sergeant (d) the learned trial judge erred in law in holding that the plaintiffs were not entitled to exemplary damages.

Held: (1) to hold that the deceased could have been promoted to the rank of Sergeant in the future would be too remote and speculative in the circumstances of this case. There might be delays in the promotion process and the possibility that the deceased might never be promoted to Sergeant could not be ruled out;

(2) the onus of proving that the deceased was legally entitled to free army quarters or an allowance in lieu thereof rested on the plaintiffs and on the evidence the plaintiffs had failed to discharge it;

(3) the loss in the amount of pension the deceased would have received was uncertain being dependent on the prospect of promotion and other contingencies in life. Having regard to these factors, the trial court would be moving into a world of unreal speculation if it were asked to perform the difficult task of assessing the loss;

(4) the claim for exemplary damages was entirely without merit and appears to be contrary to law. There is no reason why the provision in section 8(2)(a) of the Civil Law Act, 1956 that the damages recoverable should not include exemplary damages should not be extended to a claim made for and on behalf of the dependents of the deceased;

(5) the general damages awarded in this case should be apportioned to the widow and the children of the deceased.

Cases referred to:

(1) *Anna Jong Yu Hiong* v. *Government of Sarawak* [1972] 2 M.L.J. 244.
(2) *Liffen* v. *Watson* [1940] 1 K.B. 556.
(3) *Donnelly* v. *Joyce* [1973] 3 W.L.R. 514.
(4) *Cunningham* v. *Harrison & Anor.* [1973] Q.B. 942.
(5) *I.R.C.* v. *Hambrook* [1956] 2 Q.B. 641.
(6) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601, 617.
(7) *Ratnasingam* v. *Kow Ah Dek* [1983] 2 M.L.J. 297, 301.

SUPREME COURT.

D.P. Vijandran for the appellant.
M. Mahalingam, Senior Federal Counsel, for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): This is an appeal by the plaintiffs against an award of damages made by the High Court at Kuala Lumpur.

The plaintiffs are the administrators of the estate of Abel John (deceased). On the evening of June 23, 1979 the deceased was riding a motorcycle from the direction of Sungei Besi towards the highway when he was shot and killed by the police at a road block after failing to stop when ordered to do so. The claim was made for the benefit of his dependants under section 7 of the Civil Law Act 1956. Liability was admitted by the defendants and the only issue before the learned trial judge was the quantum of damages. After hearing the evidence the following awards were made in favour of his dependents:

(a) General damages	...	$ 4,000.00;
(b) Special damages	...	$ 1,350.00;
(c) Pre-trial loss	...	$24,800.00; and
(d) Post-trial loss	...	$62,278.00.

The relevant facts are not in dispute. The deceased joined the army as a private in 1969. As a result of an accident in 1971 he walked with a limp and was put in charge of the stable and horses. At the time of his death in 1979 he was 32 years old, married with two young children. He was a Lance Corporal; he and his family lived in free army quarters. According to his superior officers the deceased had good chance of getting promoted to Corporal and eventually to the rank of Sergeant in the years to come subject to passing the necessary examinations and vacancies.

The learned trial judge assessed the prospect of the deceased's future income on the basis that he would only be promoted to the rank of Corporal until he retired at the age of 55. Learned counsel for the plaintiffs submitted that the learned judge erred in law in excluding from the computation of damages the fact that the deceased could have been promoted to Sergeant with commensurate higher pay and pension. Dealing with this aspect of the case, the learned judge said:

"As for his future promotion to the rank of Sergeant, his chances do not appear to be certain as he would have to undergo a special course and to pass an exam at the end of it and even that could not guarantee a promotion as there needs to be also a vacancy in the post of Sergeant. His superior officer estimated that he may well have to serve as a Corporal from one year to six or eight years before he could hope to be promoted as Sergeant."

In *Anna Jong Yu Hiong* v. *Government of Sarawak*[1] the deceased was an Overseer Artisan Grade I in the employ of J.K.R., Miri, Sarawak at the time of his death. He was 29 years of age. It would take eight years to reach the maximum of the salary scale of $350.00. There was another post called Foreman/Chargeman Grade II on a timescale of $370x20–410 and Grade I on a salary scale of $430x20–620. It was argued that the deceased had a good chance of being promoted to this post. Indeed it was also contended that the deceased would have gone further and got promoted to the post of work superintendent on a salary scale of $690x30–1050. It was conceded that promotion to these senior posts would depend on competency, passing of departmental examinations and vacancies. Besides, there would no doubt be other suitable candidates to fill these places. The learned trial judge, after giving careful consideration to the evidence adduced before him, came to the conclusion that the deceased would continue to remain in the post of Overseer Artisan Grade I until his retirement at the age of 55. On appeal this finding of fact by the learned judge was not disturbed by the Federal Court.

Since the learned counsel for the plaintiffs had failed to show how and in what manner the learned trial judge was wrong in her assessment we are inclined to agree with her conclusion. In our judgment, to hold that the deceased could have been promoted to the rank of Sergeant in the future would be too remote and speculative, having regard to the physical disability suffered by him. There might be delays in the promotion process and the possibility that the deceased might never be promoted to Sergeant could not be ruled out. This ground of appeal therefore fails.

Next, the submission of learned counsel for the plaintiffs was that the learned trial judge erred in law in holding that the plaintiffs were not entitled to claim as a head of damages an amount equal to the value of the housing the dependants had lost as a result of the death of the deceased. The amount of the value of the housing was given as $250.00 each month albeit the deceased would be paid $85.00 per month if the army did not provide him and his family with army quarters. The question that falls for decision is whether (a) housing allowance in the sum of $85.00 per month or (b) the value of housing assessed at $250.00 each month is to be brought into account in assessing the pecuniary loss under sub-section (3) of section 7 of the Civil Law Act 1956. Learned counsel for the plaintiffs contended that this head of damages should be included but the learned Senior Federal Counsel argued that it should not.

In support of his proposition learned counsel for the plaintiffs cited the case of *Liffen* v. *Watson*[2]. In that case, as a result of receiving personal injuries in an accident, the plaintiff, a domestic servant, was unable to continue in her employment in which she received £1 a week as wages plus free board and lodging which was valued at 25s. a week. After the accident the plaintiff went to live with her father to whom she made no payment for board and lodging. In an action by the plaintiff against the defendant whose negligence caused the accident, the trial court awarded her £1,155 as damages for loss of wages but disallowed her claim for loss of board and lodging on the ground that she had not lost her free board and lodging as a result of the accident because this was provided for her by her father and that there was no evidence of any promise by her to pay her father for her board and lodging. Held, by the Court of Appeal, that the plaintiff was entitled to recover damages, not only in respect of her loss of wages, but also in respect of the loss of board and lodging. In allowing the appeal Goddard L.J. said at page 558:

"..... The question whether the plaintiff was entitled to recover damages under that head from the defendant does not depend on whether or not she had made a contract for board and lodging with someone else. The plaintiff lost her right to the board and lodging provided by her employer because she was rendered by the accident unfit to work ..... The only consideration is what the plaintiff lost. She lost the value of the board and lodging just as she lost her wages and she is entitled to be compensated for that loss....."

Liffen's case was followed by the Court of Appeal in *Donnelly* v. *Joyce*[3].

In *Cunningham* v. *Harrison & Anor.*[4] the plaintiff was severely injured in a road accident in December 1970. He was then aged 47 and was earning a salary of about £1855 a year net after tax and would have retired on pension at the age of 60. He lived with his wife in a Council house and they had two married children. When the plaintiff left the hospital and returned home in August 1971 the wife nursed him devotedly until her death just before the hearing of the claim for damages. The plaintiff was a complete tetraplegic, that means he was paralysed in all four limbs and body but his mind, sight, speech and hearing remained unimpaired. His employers paid him his full salary until September 1971 and then made him an *ex gratia* payment of £828 a year which was to continue until his death. The Court of Appeal held that this *ex gratia* payment of £828 a year for life was not to be taken into account in the assessment of the plaintiff's damages.

On the other hand, in *IRC* v. *Hambrook*[5] a tax officer, being an established civil servant, was injured whilst off duty in a collision between his motor-cycle and the defendant's motor-car. During his incapacity for nearly 10 months, IRC paid his sick pay amounting to £231.12s11d. and sued the defendant for that sum in an action for damages *per quod servitium amisit*. Lord Goddard C.J. gave judgment for the defendant holding *inter alia*, that in this form of action damage was an essential ingredient, and since the payment of sick pay was a voluntary act in the discretion of the Crown, it did not amount to damage in law. On appeal by the Crown, the Court of Appeal upheld the decision of the learned the Lord Chief Justice.

It seems to us that in *Liffen's case*, the Court of Appeal allowed the plaintiff's claim for board and lodging valued at 21s. per week because the plaintiff was entitled as of right to claim it as part of her contract of employment and there was an obligation on the employer to pay it. Whereas in both *Cunningham's case* and *Hambrook's case*, the claim was disallowed, *inter alia*, because the payment was ruled to be a voluntary one, a gift of some sort or bounty, by the employer in *Cunningham's case* and by the Crown in *Hambrook's case* and it was held that this could not form the subject of a valid claim for damages, as the payment might be granted or withheld at the discretion of the employer or the Crown.

It appears that these personal injury cases were decided under the common law whereas the claim of the plaintiffs is based on statute, *viz.* section 7 of the Civil Law Act 1956 which is *in pari materia* with the Fatal Accidents Acts 1846–1959. Although section 7 laid down no rule as to the mode of calculating the damages to be given in respect of the right of action it created but sub-section (3) enacts that in a fatal accident claim the court may give such damages as it thinks fit proportioned to the loss resulting from the death to the parties for whom and for whose benefit the action is brought subject to certain provisos with which we are not now concerned. The sub-section appears to give to the court a wide discretion but the wording has been restricted by a series of decisions and for the purpose of this appeal, we need only refer to the *dictum* of Lord Wright in *Davies* v. *Powell Duffryn Associated Colleries Ltd.*[6]:

> ". . . . . .It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."

Since that time, it is common ground that various types of allowances are paid in addition to the basic wage like housing, car, syce, cost-of-living, regional, *etc.* The question whether the deceased was legally entitled to the housing allowance, as in this appeal, has to be strictly proved and it is not disputed that the burden is clearly on the plaintiffs. Now, what are the facts? It is plain that when the deceased was killed he and his family were living in free army quarters. The deceased did not receive nor was he paid any housing allowance or the value of free housing accommodation. No evidence had been adduced in the court below that the deceased was legally entitled to the housing allowance of $85.00 each month or that the army were under a legal obligation to pay him this allowance. All that was produced by the plaintiffs at the trial was that the army provided the deceased and his family with rent-free quarters. In our opinion, this was not enough. It might well be that this benefit was voluntarily conferred on the deceased and as such, it could not form the subject of a valid claim for damages. The onus of proving that the deceased was legally entitled to free army quarters or $85.00 each month housing allowance in lieu thereof as part of his term of employment rested on the

plaintiffs and on the evidence adduced we agree with the learned trial judge that the plaintiffs had failed to discharge it. This ground of appeal also failed.

Learned counsel for the plaintiffs then complained about the manner the learned trial judge dealt with post-trial damages. In order to understand this submission we would quote *in extenso* that part of the judgment dealing with this matter [see pages 27 to 28 of the Record]:

"When computing post-trial loss, Counsel for the plaintiff had urged me to consider also loss in the amount of pension the deceased would have received had he reached the age of 60 and thereafter for a period based on the years of purchase of his widow. For this he relied on the case of *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee Malaysia* [1970] 2 M.L.J. 151 where a sum representing the difference of what the plaintiff in that case would have received had he retired at the optional age of 50 and the compulsory pension he received, was taken into account when the Court was considering the plaintiff's loss of future earnings. That case is clearly distinguishable in that the plaintiff was compulsorily retired as a result of the injuries he sustained thereby prematurely ending a promising career in the Civil Service. The fact of the case before me is different in that death resulted as a result of an accident thereby entitling the widow to a derivative pension which will cease upon her re-marriage. For that reason, loss of pension worked on the basis of what the deceased would be entitled to had he lived and continued working until he reached 60 and thereafter based on the widow's years of purchase is not maintainable."

Based on the present maximum salary scale of a Sergeant at $795.00 per month and assuming that the deceased would have completed 21 years of service and therefore be eligible for maximum pension, his estimated monthly pension would be in the region of $397.50 each month. At present, the widow received and will continue to receive a monthly service pension of $192.00 until she re-marries, and the loss was therefore $205.50 per month. It was argued by learned counsel for the plaintiffs that in assessing post-trial loss the learned judge ought to take into account the loss in the amount of pension the deceased would have received had he retired at the age of 50 after having been promoted to the rank of Sergeant.

Now, the deceased was 32 years old when he was killed in 1971 and it would take another 18 years before he reached the optional retiring age of 50. In answer to the submission of the learned counsel for the plaintiffs we would like to repeat what Lord Scarman said in the case of *Ratnasingam* v. *Kow Ah Dek*[7] at page 301 that learned counsel had "grossly exaggerated the present capital value of these distant benefits lost as a result of the accident. None of them would have materialised until the deceased had reached the optional retiring age of 55 and there was an element of uncertainly not only as to the prospect of promotion" but other contingencies in life. In our judgment, having regard to these factors, the trial court would be moving into a world of unreal speculation if it were asked to perform such a difficult task. We find there was no merit in this ground of appeal and we concur with the learned trial judge in rejecting it.

Lastly, it was submitted by learned counsel for the plaintiffs that the learned trial judge erred in law in holding that the plaintiffs were not entitled to exemplary damages in all the circumstances and the pleadings herein. No authority binding on this court had been cited in support of such a proposition. In our judgment, this contention was entirely without merit and appears to be contrary to the law. Section 8(2)(a) of the Civil Law Act 1956 enacts that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include any exemplary damages. There is no reason, in our opinion, why this provision should not be extended to cover a claim made for and on behalf of the dependents of the deceased. This ground also failed.

Sub-section (4) of section 7 of the Civil Law Act 1956 enacts that "the amount so recovered after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before mentioned parties, or any of them in such shares as the court by its judgment or decree directs". Since the learned trial judge did not appear to apportion the general damages of $91,078.00 we would divide it as follows

(a) $61,078.00 to the widow, and
(b) $30,000.00 to the 2 children of the deceased in equal shares, *viz.* $15,000.00 each.

We further order that the children's share of the damages be deposited with the Public Trustee on trust for the said children until they attain the age of majority with liberty to apply.

The appeal is therefore dismissed with costs to the respondents to be taxed. The deposit of $500.00 to be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *D.P. Vijandran Associates.*